No. 93-825

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORP., *et al.*,

Petitioners,

VS.

SHELL OIL COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY ON PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Respondent-defendants predictably oppose certiorari by arguing that there is nothing novel about the decision below and that summary judgment was really upheld because of factual failings rather than legal error. They are wrong on both counts. The but-for causation rule crafted by the Seventh Circuit has never been endorsed by this Court and has been applied by some, but rejected by most, of the Circuit Courts that have considered it. Moreover, the decision below did not even refer to petitioner-plaintiffs' evidence, let alone find it inadequate.

II. THIS COURT HAS NEVER IMPOSED A "BUT-FOR" ANTITRUST CAUSATION RULE

Defendants' first tack in attempting to dodge review of the Seventh Circuit's "but-for" rule for antitrust causation is to pretend that this Court has already decided the question. Thus, defendants argue that this Court endorsed a but-for causation rule in three earlier decisions: *Holmes v. Securities Investor Protection Corp.* (1992) 112 S.Ct. 1311, *Blue Shield v. McCready* (1982) 457 U.S. 465, and *Zenith Radio Corp. v. Hazeltine Research* (1969) 395 U.S. 100. Brief in Opposition at pp.6-8. In fact, this Court has never endorsed a rule of but-for causation in the antitrust context.

In *Holmes*, the Court considered the causation requirement of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961-1968. According to defendants, that decision, and the antitrust decision to

which it cites (*Associated General Contractors of California, Inc. v. California State Council of Carpenters* (1983) 459 U.S. 519), require a showing of but-for causation in RICO and antitrust actions. Brief in Opposition at pp. 6-7, 12. This simply is not so.

The actual holding of the *Holmes* case is that a showing of but-for causation is not *sufficient* to meet the causation requirement in either a RICO or an antitrust case. This is so because even a result linked to defendants' wrongdoing through but-for causation might still be too remote to merit statutory scrutiny. However, nothing in the *Holmes* case suggests that a showing of but-for causation is *necessary* to sustain either type of claim. Defendants obscure the meaning of this discussion of but-for causation in *Holmes* through the artful use of ellipses in the language they quote, but the full passages make this meaning clear:

> "This language can of course be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on a showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury. This conclusion is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that the Act should not get such an expansive reading."

112 S.Ct. 1316 (citations and footnotes omitted).

> "Thus, [in *Associated General Contractors*,] we held that a plaintiff's right to sue under § 4 required a showing not only that the

> defendant's violation was a 'but for' cause of his injury, but was the proximate cause as well."

112 S.Ct. 1317.[1]

Defendants' reference to *Blue Shield v. McCready*, *supra*, 457 U.S. 465, is even more misplaced. The only discussion of but-for causation in that case was this Court's acknowledgement that plaintiff had pleaded it:

> "We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services."

457 U.S. at 468 n.2.

Finally, defendants misread *Zenith Radio Corp. v. Hazeltine Research*, *supra*, 395 U.S. 100, the leading case on the "material cause" standard for proving fact of injury, as carrying an unstated but implicit but-for rule of causation. Defendants point to pages 125 to 129 of the decision, in which this Court affirmed dismissal of claims for injury in

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[1]A review of *Associated General Contractors* reiterates that this Court has never required but for causation. Indeed, the subject was not even discussed in the case. Rather, the Court simply observed that "[t]he complaint does allege a causal connection between an antitrust violation and harm to the [plaintiff]." 459 U.S. 519. Nevertheless, the Court affirmed dismissal because the connection between the offense and the injury was too indirect. 459 U.S. at 538-546.

England and Australia on the ground that plaintiff had never had an interest in entering those markets. In other words, plaintiff failed to make its case because it could not show any interest in the market in which it claimed injury, not because it failed to establish but-for causation of its injury. In contrast, there was never a showing in the present case that plaintiffs were not selling or did not intend to sell gasohol. Rather, the Seventh Circuit threw out the present case on the ground that defendants had presented a myriad of other factors that supposedly contributed to plaintiffs' injuries. Petition, Appendix A at p.23a.

Of course, the key holding of *Zenith* is that "a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." 395 U.S. at 114 n.9. In contrast, the Seventh Circuit here upheld summary judgment on the ground that "[t]here are many alternative explanations for the injuries which the plaintiffs allege." Petition, Appendix A at p.19a. After reviewing those alternatives, the court concluded:

> "Standing alone one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question. Taken together, however, the plaintiffs have failed to show with a fair degree of certainty that 'but for' the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain."

Id. at p.23a.

In other words, according to the Seventh Circuit, plaintiffs failed to show causation because they did not exhaust the alternative sources of injury proffered by defendants. This is the new rule laid down in this case that

so contrasts and conflicts with the earlier teachings of this Court.

The Seventh Circuit decision could scarcely be more at odds with *Zenith*. The isolated references to but-for causation in more recent decisions of this Court, none of which imply that a showing of such causation is a necessary element of an antitrust claim, do not suggest that the *Zenith* rule has been discarded.

III. THE SEVENTH CIRCUIT'S DECISION REFLECTS GENUINE UNCERTAINTY IN THE LOWER COURTS CONCERNING THE APPROPRIATE CAUSATION TEST

Defendants discuss a number of Circuit Court decisions that, they argue, endorse the but-for causation standard in antitrust cases applied by the Seventh Circuit in the present case. In a number of instances, defendants' interpretation of these cases is either strained or just plain inaccurate. Nevertheless, defendants' analysis merely serves to highlight the disagreement among the Circuit Courts that the decision in this case has brought to a head.

Defendants present a fairly long list of Circuit Court antitrust decisions that contain the words "but for." However, the actual holdings of the courts are widely disparate, underlining the confusion on this issue that the Seventh Circuit has highlighted. Defendants' cases can be generally lumped into a few categories.

Some of defendants' cases, like this Court's recent decision in *Holmes v. Securities Investor Protection Corp.*, *supra*, 112 S.Ct. 1311, consider whether but-for causation is

a *sufficient*, rather than a *necessary*, showing of antitrust causation. *Gregory Marketing Corp. v. Wakefern Food Corp.* (3d Cir. 1986) 787 F.2d 92, 95, *cert. denied* (1986) 479 U.S. 821, and *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.* (4th Cir. 1982) 690 F.2d 411, 412 and 415 n.4, fall in this group. *Gregory* held that a but-for showing was not sufficient; *Allegheny* held that it was not.

Certain of Respondent's cases, although they may contain the words "but for," are irrelevant to the issue raised by this petition, as the discussion of "but for" does not relate to antitrust causation. In *Amerinet, Inc. v. Xerox Corp.* (8th Cir. 1982) 972 F.2d 1483, 1494, *cert. denied* (1993) 113 S.Ct. 1048, the cited discussion of "losses due to other factors" concerned the calculation of damages, not the causation question of antitrust injury. *Midwestern Waffles, Inc. v. Waffle House, Inc.* (11th Cir. 1984) 734 F.2d 705, 718-719, concerned the special proof requirements of a tying case--plaintiff had to show the price of products absent a tie, and could not do so unless those products could be purchased in the market. *A.D.M. Corp. v. Sigma Instruments, Inc.* (1st Cir. 1980) 628 F.2d 753, addresses the completely distinct issue of antitrust injury, holding that plaintiff cannot recover where the injury suffered by plaintiff has no connection to any injury to competition. Finally, as we discussed in the original Petition at page 17, *Southwestern Sheet Metal Works, Inc. v. Semco Mfg., Inc.* (5th Cir. 1986) 788 F.2d 1144, 1147, *cert. denied* (1987) 480 U.S. 917, noted the absence of but-for causation, but went beyond that determination to find a lack of causation on the material cause standard.

Two of defendants' authorities, *Helix Milling Co. v. Terminal Flour Mills Co.* (9th Cir. 1975), *cert. denied* (1976)

423 U.S. 1053, and *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.* (5th Cir. 1972), like *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987), and the Seventh Circuit decision below in the present case, actually do appear to require a showing of but-for causation. As such, they merely highlight the split in the Circuit Courts engendered by the confusion over this issue.

Defendants admit that one Circuit Court decision, *Allied Accessories & Auto Parts Co., Inc. v. GMC* (6th Cir. 1990) 901 F.2d 1322, 1325-1326, rejects the but-for causation standard, but they attribute this to the court's erroneously equating the but-for standard and the "sole cause" standard. Brief in Opposition at p.10 n.10. (In reality, the decision does not equate the two, but merely rejects them both. *Ibid.*) However, defendants simply ignore the numerous Circuit Court decisions cited in the Petition that rejected the but-for causation rule: *Haverhill Gazette Co. v. Union Leader Corp.* (1st Cir. 1964) 333 F.2d 798, 806; *Engine Specialties, Inc. v. Bombardier, Ltd.* (1st Cir. 1979) 605 F.2d 1, 14, *cert. denied* (1980) 446 U.S. 890; *Tire Sales Corp. v. Cities Service Oil Co.* (7th Cir. 1980) 637 F.2d 467, 475, *cert. denied* (1981) 451 U.S. 920; *Weiman v. Kroehler Mfg. Co.* (7th Cir. 1970) 428 F.2d 726, 729; *Switzer Brothers, Inc. v. Locklin* (7th Cir. 1961) 297 F.2d 39, 47; *William Inglis & Sons v. Continental Baking* (9th Cir. 1991) 942 F.2d 1332, 1339; *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* (9th Cir. 1990) 906 F.2d 432, 462-463.

Contrary to defendants' arguments, the Seventh Circuit's decision is a reflection of widespread confusion regarding the causation standard in antitrust causation. Inconsistent and insupportable results, like those in the

present case, will continue to proliferate until this Court steps in and addresses the matter.

IV. THE SEVENTH CIRCUIT DID NOT UPHOLD SUMMARY JUDGMENT ON "UNREBUTTED EVIDENCE"

In their continual effort to convince this Court that plaintiffs suffered a factual rather than a legal defeat, defendants repeatedly assert that summary judgment was proper because of plaintiffs' supposed total failure to present any evidence in their favor. Thus, defendants assert that "the petition ignores plaintiffs' failure to proffer any evidence sufficient to meet their burden of proving causation under any standard." Brief in Opposition at p. 13. Defendants even rewrite the question presented to reflect this contention. As they see it, the question is: "Whether an antitrust claim is properly dismissed on summary judgment where, in the face of unrebutted evidence negating causation, a plaintiff fails to offer any evidence that an alleged violation was a material cause of the claimed injury?"

While the argument that plaintiffs presented no evidence is a handy way of avoiding certiorari, it suffers from the defect that it simply is untrue. Plaintiffs did in fact introduce a great deal of evidence on the subject of antitrust causation.[2]

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[2]See, Plaintiffs-Appellants' Appendix filed in the Seventh Circuit, August 5, 1992, at *536 Rec.* Vol. VI., Tab 38, pp. 3526-28, 3531-38, 3555-56, 3558-62, 3565-66, 3571, 3581-83, 3599-3602, 3608-10; *455 Rec.*, pp. 45-49 and nn. 53-63; *536 Rec.* Vol. XI, p. 7000-Vol. XVIII, p. 11042.

Even more to the point, however, is the fact that the supposed failure to present evidence is not the basis of the Seventh Circuit's ruling. At no point in its discussion of causation does the Seventh Circuit ever suggest that plaintiffs did not present evidence of antitrust causation. Petition, Appendix A at pp.18a-23a. Instead, it simply describes a great deal of defendants' evidence concerning other business factors in detail, accepts it as true, and concludes that plaintiffs could not have established causation under the erroneous but-for standard.[3] *Ibid.* This hardly amounts to a failure of proof on plaintiffs' part.

V. CONCLUSION

The Seventh Circuit's decision below represents a nascent trend in some Circuits to require antitrust plaintiffs to satisfy the wholly inappropriate but-for standard of causation. Defendants' characterization of this decision as business as usual in antitrust jurisprudence cannot withstand scrutiny. This Court has never endorsed such a standard, and with good reason. It allows antitrust defendants to achieve summary judgment by filling the record with largely irrelevant evidence of the numerous factors that might influence outcomes in a complex economic market. This

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[3]The Seventh Circuit did not acknowledge that the record contained evidence disputing all eight factors of the defendants' evidence that it had uncritically accepted, and that not every factor applied to all of the plaintiffs. See, Plaintiffs-Appellants' Appendix filed in the Seventh Circuit at *725 Rec.*, Tab 1, pp. 153-59, 518, 523-24, 539-40, 804-805, Tab 2, pp. 5-6, Tab 3, pp. 43-44, 87-89, 107-08, 114-16, 286, 516, 518, 522-23, 635-36, Tab 4, Tab 7, Tab 9; Defts. App. in 7th Cir. A14-18.

Court should grant certiorari to bring the lower courts into line on this point and eliminate the confusion that brought about the result below.

Respectfully submitted,

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